

# Circuit Court of Appeals

FOR THE NINTH CIRCUIT. 10

LOUIS STRADA,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF  
AMERICA,

*Defendant in Error.*

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## PETITION FOR RE-HEARING

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*Of Counsel.*

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CLERK



IN THE  
UNITED STATES  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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**PETITION FOR RE-HEARING**

Now comes the plaintiff in error, Louis Strada, and moves this Honorable Court for a rehearing of its decision in said cause rendered on June 5, 1922, and in support of his motion respectfully submits:

The court in its opinion citing *Lewinsohn vs. United States*, 278 Federal, 421, uses the following language: "The continuity of wrong doing implied in the charge of maintaining a nuisance may sufficiently appear from the nature and circumstances of a single transaction". The case cited in dealing with this point uses the following language, "There could be, however, an almost irrefutable conclusion drawn from a single sale, provided the facts surrounding such sale warranted the inference that it was one of the ordinary and usual incidents of the business there

conducted." The purchaser there entered the place, inquired about the price of whiskey, put his money on the bar and asked for whiskey. Defendant poured out some beverage and gave it to the customer. In the Lewinsoln case *supra*, apparently the defendant was conducting a soft drink establishment with all the appurtenances of a saloon, and the sale, so made was an ordinary and usual incident of the business there conducted. In the case at bar, however, the plaintiff in error was conducting a restaurant and employed a number of waiters for the purpose of serving food to his patrons, and the selling of whiskey and liquors prohibited by the Volstead Act was not an ordinary and usual incident of his business. Also in the present case, there is no such proof, or any proof whatsoever as to a sale made by Mr. Strada, the plaintiff in error.

We submit that the rule laid down in *United States vs. Cohen*, 268 Fed., 420, is applicable to and should govern the present case.

Further, the court in its opinion, in the present case, uses the following language, "So here from the sales made by the defendant in person on September 30." We respectfully submit that there is no testimony on which a conclusion could be reached that the defendant personally made a sale on September 30th or at any other time. We beg the indulgence of the court to set forth the testi-

mony of J. J. Finnegan, the only witness on behalf of the United States who testified relative to a sale made by the plaintiff in error at any time.

Transcript of Record, pages 37 to 41:

“J. J. Finnegan, a witness called on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

*By Mr. Ellis:*

I was a deputy sheriff in October, 1920. I went to this place, this restaurant, about September 30. I heard what the witness, Mr. Mossholder, said.

Q. What did you do on that occasion?

*Mr. Burch:* Objected to as incompetent, irrelevant and immaterial.

*The Court:* Overruled.

*Mr. Burch:* Not covered by the pleadings September 30.

*The Court:* Overruled.

*Mr. Burch:* Exception.

I first went to the front of the Cafe and spoke to Mr. Strada. He told me to go to the back room which I did. I asked Mr. Strada if he could fix me up for a little drink. He asked me who I was. I told him I had been there several times before. He told me to sit down and asked me what kind of drink I wanted. I first told him I wanted whiskey. He said he was all out of that but had a little wine. I asked him how much it was and he said he usually charged seventy-five cents

but would give it to me for fifty cents. I said all right to give it to me, which he did. I was then in the rear of the room on the right hand side of the restaurant which is located on Fifth and I Street on the North-west corner, when he served that to me. I am talking about the defendant Mr. Strada. I went there the following night. I ordered a drink from a big fat fellow. Strada was in the front part of the restaurant. I got wine. The waiter told me that he was afraid to give it to me.

*Mr. Burch:* I object to that as incompetent, irrelevant and immaterial. It does not have a tendency at all to bind Strada.

*The Court:* Overruled.

*Mr. Burch:* Exception.

I asked him why he was afraid. He told me that I didnt look good to him. I waited at the table and he served me with wine. I know what wine is. I paid fifty cents a cup. It was served in a little tea cup. I had about 8 or 9 cups of wine.

Q. Did you feel any effects of it?

A. I think I did, you bet. The effect it had on me was that I was about half intoxicated when I left the restaurant. I did not notice Strada when I went out. The last recollection I had he was there. I went there again on October 3 with Mr. Mossholder. Mr. Mossholder and I went in the side entrance. We ordered wine. We got one drink of wine at that time. I paid fifty cents a cup; there were two cups. I dont remember seeing Strada there that time. The first time that I went in that restaurant I saw this

other man in there. Strada didn't serve me; he told me to go to the rear of the store the first time where the big fellow served me. Strada has never sold me wine. Strada sent me back to the rear to get what I wanted. The man who served me the first evening was the man who served Mr. Mossholder and me the last time. When the waiter came in I told him that I was speaking to the Boss and I wanted a drink. He wanted to know what boss I had been speaking to and I told him the boss up in front. Before serving me he went to the front of the building where the defendant was. I did not see him with the defendant. I was in a booth in the rear. He then came back and served me."

#### CROSS EXAMINATION

*By Mr. Wissburg:*

"I was working from the sheriff's office when I went to that restaurant with Mr. Mossholder for the purpose of getting evidence if I could. Strada did not serve me at any time that evening and I did not hear him tell the waiter anything about serving me. The waiter served me and took my money. I do not know what he did with the money. I did not see him put it in the till. He picked it up and carried it in his hand as far as I could see. I do not know whether he gave it to Mr. Strada or not.

The second evening I was there I had 8 or 9 cups. I went there for the purpose of securing evidence. I did not get a bottle because I did not ask for it. I did not have any drinks there before I went there the second time. Mr. Strada did not wait on me at all when I got the 8 or 9 cups. I call that which



was served me Dago Red. I do not know the different kinds of Dago Red, as to the quantity of alcoholic contents.

I am an automobile salesman and have been for about seven years. I had been engaged in working with the sheriff in getting evidence about drinks for seven months at the time I went to Mr. Strada's. I did not take any of the drinks out of the cups. I drank every bit of it. I cannot state what per cent of alcohol that contained. I have no idea what per cent it contained."

#### RE-DIRECT EXAMINATION

*By Mr. Ellis:*

"The drink that I got when I went with Mr. Mossholder was the same kind of wine I had purchased at the time when I drank 8 or 9 cups of it. It was the same stuff. I did not feel any effect of this one cup. By the taste of it it was the same stuff."

#### RE-CROSS EXAMINATION

*By Mr. Wissburg:*

I did not get any whiskey there. I did not speak to Mr. Strada about whiskey. Mr. Strada was in the front all the time that I was in the rear. I was never served any whiskey."

This witness' testimony on direct and cross examination is inconsistent and cannot be harmonized. Can the court reasonably say from this testimony that the plaintiff in error did, in person, make a sale on September 30? The jury did



not find the plaintiff in error guilty of a sale at any time, and were unable to reach a verdict as to the first count of the information.

Transcript of Record page 7.

Transcript of Record page 18.

Mr. Strada, the plaintiff in error admitted that he had grape juice on the premises and was selling this product to his customers and it would not be out of the ordinary if he referred to this product as wine in his conversation with Mr. Finnegan.

“To constitute a place a common nuisance which may be closed to use by injunction under the National Prohibition Act title 2, section 22, its unlawful use must be with the consent of the owner, or he must have had knowledge or reason to believe it was so used.”

*United States vs. Butler, et al.*, 278 Fed., 677.

We respectfully request the court to again review the evidence in the present case as disclosed by the transcript of record and to again consider the question as to whether or not the plaintiff in error had knowledge of the alleged sales or whether the same were with his consent or not or whether he had reason to believe that sales of

wine or whiskey were being made in his place of business.

Respectfully submitted,

A. L. WISSBURG,

*Attorney for Plaintiff in Error.*

O'KEEFE AND VAN WINKLE,

*Of Counsel.*

I hereby certify that I am attorney for plaintiff in error, and that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

A. L. WISSBURG,

*Attorney for Plaintiff in Error.*